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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1081

DAVID W. BROWN, Private E-2, RA 11 979 464,

Petitioner,

—v.—

HON. ROBERT S. MCNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HON. ROBERT S. MCNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 24, 1967.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, as yet unreported, is set out in the Appendix, *infra,* pp. 1a-8a. The amended opinion of the United States District Court for the District of New Jersey is reported at 263 F. Supp. 686, and is set out in the Appendix, *infra,* pp. 9a-23a.

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 24, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this case are the First, Fifth, and Sixth Amendments to the Constitution of the United States.

Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. ¶456(j), is set out in the Appendix, *infra,* pp. 24a-25a.

Department of Defense Directive (DOD) 1300.6, and Army Regulation (AR) 635-20 are set out in the Appendix, *infra,* pp. 26a-41a and pp. 42a-45a, respectively.

Questions Presented

1. Whether petitioner's application for discharge from the U. S. Army as a conscientious objector was arbitrarily denied.
2. Whether Department of Defense Directive 1300.6 and Army Regulation 635-20 violate the due process clause of the Fifth Amendment.

Statement of the Case

Petitioner is a private in the United States Army, having enlisted on May 17, 1966 for a period of three years. On June 28, 1966, after two weeks of basic training, petitioner, pursuant to Army Regulations (AR) 635-20,[1] submitted an application for discharge as a conscientious objector.[2] The application recited, among other personal data, that petitioner was a member of the Methodist Church, as were his parents, that he believed in a Supreme Being, and that his application for conscientious objector status was based on religious training and belief, as well as on "pacifist training." His application was supported by accompanying letters from John J. McCabe, the Assistant Methodist Chaplain at Yale where petitioner was a student prior to his enlistment; Arthur Brandenburg, Methodist Chaplain of the Wesley Foundation at Yale; Wallace T. Viets, Pastor of the First Methodist Church, New Haven, Conn.; Mrs. David W. Brown, his wife; and Mr. and Mrs. Richard W. Anderson, close friends of petitioner. The application was also accompanied, as required by AR 635-20(4)(c), by a statement by Stewart K. Lewis, Brigade Chaplain, which said that in his opinion, petitioner's "beliefs, though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions" (A. 10a).[3]

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[1] The full text of AR 635-20 is set out in the Appendix, *infra*, pp. 42a-45a.

[2] Appellant had not applied to Selective Service for exemption as a conscientious objector prior to enlistment. Had he done so, he would have been ineligible under AR 635-20(3)(b).

[3] The symbol "A" refers to the printed Appendix filed in the court below which is part of the Record filed with this Petition for Certiorari.

Petitioner's entire application is set out at A. 2a-19a.

Following the procedure required by AR 635-20, petitioner's application proceeded through the chain of command: (1) His commanding officer recommended disapproval of the application because petitioner's beliefs are "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs." The commanding officer based his opinion on the fact that "Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in his country" (A. 28a). (2) The Brigade Assistant Adjutant recommended disapproval of the application for discharge but did recommend that petitioner be reclassified I-A-O and transferred to non-combatant duty (A. 27a). (3) The Base Commanding General recommended disapproval on the ground that petitioner "does not meet the criteria for separation under the provisions of paragraph 4, AR 635-20"[4] (A. 26a). (4) The Commanding General, First Army, recommended disapproval "under the provisions of paragraph 3(b), AR 635-20"[5] (A. 25a). (5) The Adjutant-General, United States Army, denied the application. The denial recited that "The opinion of the Director of Selective Service that Private Brown would not be properly classified as I-O or I-A-O if he were being considered for induction at this time was considered in making this decision" (A. 24a). Peti-

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[4] Paragraph 4, entitled "Procedure," sets out the manner in which application is to be made and its contents.

[5] Paragraph 3(b) states that requests for discharge "will not be entertained when based solely on conscientious objection which existed, but which was not claimed prior to induction [or] enlistment . . . [or] when based solely on conscientious objection claimed and denied by Selective Service prior to induction." Petitioner made no such application to Selective Service prior to enlistment. He also asserts that his conscientious objection "crystallized" only after his enlistment (Complaint, para. 6).

tioner was notified of the rejection of his application on or about October 6, 1966.

On October 7, 1966, petitioner was ordered to draw combat training equipment. Compelled by his religious training and belief, petitioner refused to do so. On October 10, 1966 petitioner was charged with failure to obey a lawful order of a non-commissioned officer under Art. 91, Uniform Code of Military Justice (10 U. S. C. §891). On October 15, 1966, he was tried and convicted under that charge by a special court-martial and sentenced to three months confinement and forfeiture of $37.00 per month of his pay. Execution of the sentence was suspended the same day (Complaint, paras. 15-16).

On October 17, 1966, petitioner was again ordered to draw combat training equipment, he again refused, and he was again charged, this time for failure to obey a lawful order of a commissioned officer under Art. 90, U. C. M. J. (10 U. S. C. §890) (Complaint, para. 17). A pre-trial investigation was conducted under Art. 32, U. C. M. J., but a second court-martial was not recommended. However, the suspension of sentence adjudged by the first court-martial was vacated and petitioner entered confinement on November 16, 1966 (Complaint, para. 16).[6]

A petition for a writ of habeas corpus was filed on November 29, 1966 in the United States District Court, District of New Jersey, Civil 1186-66, alleging that petitioner was held in unlawful custody by the United States Army for the following reasons:

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[6] Subsequently, petitioner was charged with a third violation of Art. 90, U. C. M. J., convicted by general court-martial, and sentenced to eighteen months imprisonment. App. *infra*, p. 3a, footnote 2. Petitioner is presently serving that sentence.

(a) The denial of his application for discharge as a conscientious objector was in violation of 50 App. U. S. C. §456(j), Department of Defense Directive (DOD) 1300.6, and AR 635-20.

(b) The denial of his application for discharge as a conscientious objector was in violation of due process of law as required by the Fifth Amendment because it was arbitrary and without any basis in fact.

(c) The denial of his application for discharge was in violation of due process of law as required by the Fifth Amendment because he was never afforded a hearing and never advised of the grounds upon which his application for discharge was denied.

(d) The denial of his application for discharge was in violation of the equal protection of the laws as required by the Fifth Amendment in that individuals seeking to be recognized as conscientious objectors by the Selective Service System before entering the armed services are afforded hearing rights, and there is no rational basis for denying a hearing specifically or as a matter of course to individuals who become conscientious objectors only after entering the armed services.

An order to show cause was issued by the District Court on November 29, 1966 and argument on the application to issue the writ was heard on December 19, 1966. After argument, the District Judge, Hon. Arthur S. Lane, dismissed the petition with an opinion, later amended, holding that the federal courts were without jurisdiction to review the determination by the Army denying petitioner's applica-

tion for conscientious objector status and rejecting on the merits petitioner's claims regarding the procedural defects of the pertinent regulations.

On appeal to the United States Court of Appeals for the Third Circuit, Judges Van Dusen and Maris held that Federal courts have the power to review denial of applications for discharge from the armed forces by conscientious objectors. However, because Judge Van Dusen held that the denial in this case was not arbitrary or capricious, and because Chief Judge Staley concluded that the Court was without jurisdiction to review, the decision of the District Court was affirmed. Judge Maris would have reversed on the ground that "the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs" (App., *infra*, p. 7a).

Reasons for Granting the Writ

This case presents the substantial question whether the denial of an application by a member of the armed forces for conscientious objector discharge, on the ground that the applicant's beliefs are based *in part* on allegedly non-religious pacifist readings and contacts, is for that reason arbitrary, without basis in fact, and in conflict with *United States* v. *Estep*, 327 U. S. 114 (1946), *United States* v. *Seeger*, 380 U. S. 163 (1965), and *Dickinson* v. *United States*, 346 U. S. 389 (1953).

A. The substantial concern this Court has demonstrated in ensuring that denials of claims for exemptions under the

Selective Service Law[7] not be based on mere "suspicion and speculation," *Dickinson* v. *United States, supra* at 397, has been made manifest in several instances by the granting of certiorari to review allegedly arbitrary selective service classifications. See, e.g., *Estep* v. *United States,* 327 U. S. 114 (1946); *Witmer* v. *United States,* 348 U. S. 375 (1955); *Dickinson* v. *United States, supra; United States* v. *Seeger, supra.*

Moreover, the ground on which the court below sustained the Army's denial of petitioner's application for discharge —that the beliefs underlying his opposition to military service were based in part on non-religious pacifist contacts —is in direct conflict with the ruling of this Court in *United States* v. *Seeger, supra* at 186, and the decision of the Court of Appeals for the Tenth Circuit in *Fleming* v. *United States,* 344 F. 2d 912, 915-916 (10th Cir. 1965). These cases hold that the fact that one's beliefs are based in part on non-religious principles does not preclude conscientious objector status.[8]

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[7] Petitioner agrees with the Court below on the applicability to this case of standards developed in Selective Service cases. See *Gilliam* v. *Reaves,* 263 F. Supp. 378, 384 (W. D. La. 1966). And see DOD 1300.6, the Department of Defense directive issued to insure "uniform procedures for the utilization of conscientious objectors in the armed forces and consideration of requests for discharge on the grounds of conscientious objection," which provides that the standards used by the Selective Service System in determining I-O or I-A-O classification of draft registrants prior to induction are considered appropriate for judging the conscientious objector claims of those who are already members of the armed forces. Part III (F), App., *infra,* pp. 28a-29a.

[8] The case at bar is also an example of the variance between the armed forces' standards for disposing of conscientious objector claims and the standards enunciated by this Court. See *N. Y. Times,* June 17, 1967, p. 13, col. 5. "Pentagon Scored Over Objectors," reproduced, *infra,* pp. 46a-48a.

B. Under the "basis in fact" test enunciated in *Estep* v. *United States, supra,* military authorities are not free, absent impeaching or contradictory evidence, to disbelieve the applicant's evidence. *Dickinson* v. *United States, supra* at 396. The courts are required to search the record for some "affirmative evidence" which is incompatible with the applicant's tender of proof of exemption. *Ibid.* To allow "suspicion and speculation" to serve as a basis for denial would be "contrary to the spirit of the [Selective Service] Act and foreign to our concepts of justice." *Id.* at 397.

Judging the denial of petitioner's application for conscientious objector discharge in light of this unambiguous standard, it becomes clear that the Army acted in an arbitrary manner and that its decision is unsupported by the requisite basis in fact. Petitioner satisfied each of the criteria necessary to secure conscientious objector status under AR 635-20, DOD 1300.6, and 50 U. S. C. App. §456(j). The government had conceded petitioner's sincere belief in a Supreme Being.[9] Thus, the sole remaining issue was whether petitioner's proof of religious training and belief was rebutted by *any* evidence. Cf. *Sicurella* v. *United States,* 348 U. S. 385, 388 (1955). No such countervailing evidence is to be found in the record. In the face of the copious and uncontroverted evidence submitted by petitioner, both the Army and the court below seized on the statements of the Brigade Chaplain and of the Commanding Officer that petitioner's beliefs were based, at least in part, on contacts with or influences made upon him by allegedly non-religious pacifist organizations.

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[9] The concession was made at the District Court Hearing hearing on the order to show cause. It appears at p. 26 of the transcript of that hearing. The transcript is not part of the Record here.

Under this Court's ruling in *Seeger*, statements concerning non-religious influences are not evidence with which the Army can properly satisfy the "basis in fact" test. *Seeger* held that a non-religious basis for opposition to military service may operate as a ground for denial of a claim to exemption only if it is the *exclusive* source of his conscientious objector beliefs. *United States* v. *Seeger, supra* at 186.[10] In *Fleming* v. *United States*, 344 F. 2d 912, 915-916 (10th Cir. 1965), the court properly read *Seeger* to exclude exemption only if the non-religious basis for the beliefs was the *sole* basis of the applicant's claim.

Equally important here, there is no warrant whatever for concluding that persons practicing pacifism or that pacifist organizations with which they are in contact are necessarily non-religious. As the dissenting opinion of Judge Maris in this case points out:

> ". . . it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. . . . It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to

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[10] Seeger's beliefs were found "to be based upon individual training and belief, both of which included research in religious and *cultural* fields." *Seeger* at 167 (Emphasis added).

> assume . . . that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated.[11]

In *Seeger* this Court explicitly cautioned those who pass on conscientious objector applications to remember

> "that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." *Seeger* at 184.

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[11] Compare a standard dictionary's definition of "pacifism":

> "Opposition to war or to the use of military force for any purpose; esp., an attitude of mind opposing all war, emphasizing the defects of military training and the cost of war, and advocating settlement of international disputes entirely by arbitration; also the system of beliefs or opinions opposing war or the use of military force." Webster's International Dictionary (2d Ed.).

Thus, the word "pacifism" is neutral. As a "system of beliefs," it may or may not be based upon religion—but to believe that it *ipso facto* excludes a foundation in religion is without any support whatever.

This admonition is no less applicable to the military, a point this Court is urged to make by granting petitioner's writ of certiorari.

C. The court below supported its finding that a basis in fact existed for the Army's determination by drawing

> "specific attention to . . . the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized 'to the extent practicable and equitable' and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claims two weeks after beginning basic training (six weeks after enlisting) . . ." App., *infra*, p. 5a.

Obviously, these factors are not evidence in this case. They are merely restatements of the governing military standards about which petitioner has raised no question. Such conclusory statements cannot create a "basis in fact." The relevant point is that petitioner's uncontroverted evidence conclusively demonstrates that he has fully satisfied his burden with respect to these factors. Under these circumstances, petitioner's claim must be honored. *United States* v. *Seeger, supra; Witmer* v. *United States, supra.* See also, *Batterton* v. *United States,* 260 F. 2d 233 (8th Cir. 1958); *Pitts* v. *United States,* 217 F. 2d 590 (9th Cir. 1954); *Williams* v. *United States,* 216 F. 2d 350 (5th Cir. 1954).

D. The procedures established by AR 635-20 for the processing, evaluation and adjudication of applications for conscientious objector status are totally devoid of minimum standards of procedural due process and thereby violate the Fifth Amendment.

Military proceedings, whether criminal, civil, or administrative, are subject to essential Fifth Amendment procedural due process guarantees.[12] The courts have refused to defer to congressional acts or military regulations establishing procedures devoid of even the minimal protection of due process. "Military due process" is judged generally by the same criteria and under the same standards as "civilian due process." The general rule is summarized in *Unglesby* v. *Zimny*, 250 F. Supp. 714, 718 (N. D. Calif. 1965):

> "Although it is clear that Congress may set standards of military due process in view of military necessity, such standards as are adopted must conform to minimal requirements of constitutional due process."

The Fifth Amendment has consistently been applied to military discharge procedures. See *Bland* v. *Connally*, 293 F. 2d 852 (D. C. Cir. 1961) (right to confront adverse witnesses); *Davis* v. *Stahr*, 293 F. 2d 860 (D. C. Cir. 1961) (right to confrontation); cf. *Williams* v. *Zuckert*, 372 U. S. 765 (1963); *Harmon* v. *Brucker*, 355 U. S. 579 (1958) (Secretary of Army exceeded authority in considering preinduction activity of discharge); *Beard* v. *Stahr*, 370 U. S. 41 (1962) (particularly discussion in dissenting opinion of right to confrontation and cross-examination); *Reed* v. *Franke*, 297 F. 2d 17 (4th Cir. 1961) (post-discharge hearing satisfies due process).

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[12] The "essence of justice" has been described as "largely procedural", 1 Davis, *Administrative Law*, §7.20, p. 506 (1958), and the fairness of procedure as constituting "due process in the primary sense." *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681 (1930). See also *McNabb* v. *United States*, 318 U. S. 332, 347 (1943); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 179 (concurring opinion); *Shaughnessy* v. *Mezei*, 345 U. S. 206, 224 (1953) (dissenting opinion).

While one or more of the attributes of the basic elements of procedural due process may, upon good cause shown, be relaxed, the following have traditionally been held essential prerequisites to administrative determinations:

1. The right to present evidence (witnesses and documentary) and argument.

2. The right to be heard orally.

3. The right to rebut adverse evidence, through cross-examination and other appropriate means including the confrontation of adverse witnesses.

4. The right to appear with counsel.

5. The right to a reasoned decision based upon known evidence.

AR 635-20 provides only for the right to present some written evidence (the application form), and nothing else.[13] In the course of the consideration, processing, evaluation and determination of his application, petitioner was denied virtually every necessary ingredient of due process. A basic personal liberty is at issue, and no emergency or exigency exists which would justify abrogation of the right. Cf. *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (1908) (hearing provided after administrative action).

Finally, any attempted rationalization of the Army procedures based upon the amorphous "right-privilege" distinction is misplaced. The claimed status of conscientious objection surely amounts to more than a mere privilege. It has been recognized by Congress since the framing of the

[13] Except for the Chaplain's interview.

Constitution as a significant right, grounded in the tenets of the First Amendment's injunction against the interference with the free exercise of religion. See *United States* v. *Seeger, supra.* Termination of the statutory right to conscientious objection would present a grave constitutional question. Whether or not the free exercise clause requires congressional recognition of conscientious objector status, the right to procedural due process is not limited to constitutional rights. Due process protections attach as well to rights recognized by statute or administrative regulation. See, e.g., *Garner* v. *Los Angeles Bd. of Public Works,* 341 U. S. 716, 725 (1951) (concurring opinion); *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 894 (1961); *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947); *Homer* v. *Richmond,* 292 F. 2d 719, 722 (D. C. Cir. 1961).

Most important, the nature of the claim itself compels a hearing. The various subjective factors which AR 635-20 submits to official consideration in determining the validity of conscientious objector claims require logically that an opportunity be accorded to both sides to meet opposing arguments.[14]

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[14] DOD 1300.6 and AR 635-20 also fail to afford equal protection to conscientious objector claimants in the Army. Central to the discriminatory difference is the omission from AR 635-20 of the hearing rights which have proved critical for conscientious objector claimants within the Selective Service System. See 32 C. F. R. 1624-1627.

Due process forbids distinctions which are arbitrary and which do not embody a proper legislative or administrative purpose. See *Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Barbier* v. *Connolly,* 113 U. S. 27, 31-32 (1885); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79 (1911). There are no rational grounds to justify the denial of critical hearing rights to young men whose conscientious objections to war in any form crystallize when they are in the armed services.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX